Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1998

THE DIVISION OF MOTOR VEHICLES OF THE WISCONSIN DEPARTMENT OF TRANSPORTATION AND ITS ADMINISTRATOR,

Petitioners,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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6788

QUESTION PRESENTED

Whether Congress' enactment of the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, violates the Tenth Amendment to the United States Constitution.

LIST OF PARTIES

Actual parties to the proceedings in the Court of Appeals were:

Roger D. Cross, in his capacity as Administrator of the Division of Motor Vehicles of the Wisconsin Department of Transportation, and the Division of Motor Vehicles of the Wisconsin Department of Transportation,

Petitioners herein,

State Representative David M. Travis, State Senator Fred Risser, State Representative Robert K. Zukowski, State Representative Eugene Hahn, State Representative Michael D. Huebsch, David Zweifel and Pamela Moorshead,

Plaintiffs-Appellees in the United States Court of Appeals for the Seventh Circuit

Janet Reno, Attorney General of the United States, and the United States of America,

Respondents herein.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Division of Motor Vehicles of the Wisconsin Department of Transportation and its Administrator, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 16, 1998, that the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, does not violate the Tenth Amendment.

This petition presents the same question raised in the petition filed on March 15, 1999 in *Reno, et al. v. Condon*, No. 98-1464, and the petition filed on May 3, 1999, in *Oklahoma ex rel. Oklahoma Dep't of Public Safety v. United States*, No. 98-1760.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 163 F.3d 1000 (CA7 1998) (Pet.-Ap. 9a-24a). The opinion of the United States District Court for the Western District of Wisconsin is reported at 12 F. Supp. 2d 921 (W.D. Wis. 1998) (Pet.-Ap. 27a-46a).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 16, 1998. Petitioners filed a timely Petition for Rehearing With Suggestion of Rehearing En Banc which was denied by Order dated February 11, 1999 (Pet.-Ap. 7a-8a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 is reprinted in full in the Appendix (Pet.-Ap. 1a-6a).

STATEMENT OF THE CASE

A. Statutory Background

This case involves a constitutional challenge under the Tenth Amendment to the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2775. The Driver's Privacy Protection Act is a detailed federal scheme prohibiting the disclosure and use of certain State motor vehicle records, except for enumerated purposes. The DPPA defines "personal information." *See* 18 U.S.C. § 2725(3). The DPPA mandates disclosure of that "personal information" by a "State department of motor vehicles" in some circumstances (*see* 18 U.S.C. § 2721(b)), prohibits it in others (*see* 18 U.S.C. § 2721(a)) and permits it in yet others (*see* 18 U.S.C. § 2721(b)(1)-(14)).

Compliance with the DPPA requires that for each request to a State department of motor vehicles for information a State employee must make a determination of whether the requested information is "personal" under the DPPA. If the information is not "personal," then the State employee may release the information. If the State employee determines the requested information is "personal," he must determine whether it is subject to mandatory disclosure, permissive disclosure, or may never be disclosed under the federal DPPA.

Compliance with the DPPA is not voluntary; the DPPA compels State departments of motor vehicles to administer the federal program by having substantial criminal fine and civil penalty provisions. Petitioner Wisconsin Division of Motor Vehicles faces a civil penalty of up to $5,000 per day for "substantial noncompliance" with the DPPA. 18 U.S.C. § 2723(b). Petitioner Roger D. Cross, the Administrator of the Division of Motor Vehicles, and all employees of that Division, face individual criminal fines

and civil damage suits if they release information that should not have been released under the DPPA. 18 U.S.C. §§ 2723(a) and 2724(a).

The DPPA's prohibitions on disclosure conflict with Wisconsin's public records law. In Wisconsin motor vehicle registration information is a public record under Wis. Stat. §§ 19.35(1)(a) and 341.17(6). Driver license information is a public record under Wis. Stat. §§ 19.35(1)(a) and 343.24(1) and (2m).

The record is undisputed that petitioners had to make significant changes in how the Wisconsin Division of Motor Vehicles conducted its business as a result of compliance with the DPPA. The Wisconsin Division of Motor Vehicles has incurred large burdens and costs as a result of compliance with the DPPA. *See generally*, R. 24, Schwartz Aff., Wehrle Aff., Thiel Aff.; 12 F. Supp. 2d at 923 (Pet.-Ap. 30a).

B. Procedural Background

1. This case involves a constitutional challenge to the Driver's Privacy Protection Act brought by five members of the Wisconsin Legislature, an editor of a Wisconsin newspaper whose job requires access to records of the Wisconsin Division of Motor Vehicles and an attorney in Wisconsin whose practice focuses on criminal and traffic defense and requires her to have access to records of the Wisconsin Division of Motor Vehicles. Petitioners herein, the Division of Motor Vehicles of the Wisconsin Department of Transportation and its Administrator, Roger D. Cross, were named as defendants in the district court action, along with the United States of America and Janet Reno (respondents herein). Petitioners moved to be realigned as plaintiffs. The district court granted the motion for realignment. Respondents moved to dismiss the action and petitioners moved for summary judgment. The district court

granted petitioners' motion for summary judgment and enjoined the enforcement of the DPPA on the grounds that the DPPA violates the Tenth Amendment and is not saved by § 5 of the Fourteenth Amendment. The Seventh Circuit Court of Appeals reversed, and denied petitioners' motion for a stay of mandate. By Order dated March 31, 1999, Associate Justice of the Supreme Court of the United States John Paul Stevens granted petitioners' application to recall and stay the mandate of the Seventh Circuit pending the filing and disposition of this petition for a writ of certiorari (No. A-795).

2. The district court held that the DPPA violates the Tenth Amendment. The district court discussed this Court's decisions in *New York v. U.S.*, 505 U.S. 144 (1992), and *Printz v. U.S.*, 521 U.S. 898, 117 S. Ct. 2365 (1997), noting this Court's determination that federal laws that direct state officials to administer or enforce federal regulatory programs violate the Tenth Amendment. The district court found that the DPPA is not a law of general applicability comparable to those upheld in cases such as *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *South Carolina v. Baker*, 485 U.S. 505 (1988).

After careful analysis the district court concluded that the DPPA violates the Tenth Amendment because it forces state officials to administer and enforce a federally enacted regulatory program:

> The act establishes a detailed set of rules to control the circumstances under which Wisconsin may disclose certain information in its driver's license and motor vehicle records to third parties; these rules displace conflicting policies regarding disclosure established by Wisconsin legislators through the state's open records law; state officials are responsible for insuring that this information is disclosed only

> for designated purposes specified by the federal rules; and the federal government has no role in this process, financially or otherwise. If this does not describe a federal law that directs state officials to administer or enforce a federal regulatory program, the standard articulated by the Supreme Court in *New York* and *Printz* has done great damage to the English language.

12 F. Supp. 2d at 928 (Pet.-Ap. 40a).

3. The Seventh Circuit reversed. The Seventh Circuit's decision itself acknowledged that "each side to this controversy can take comfort from the decisions of the Supreme Court" but went on to overturn the decision of the district court. 163 F.3d at 1001 (Pet.-Ap. 10a). The Court of Appeals found that the DPPA was within Congress' commerce power and consistent with constitutional principles of federalism. The Seventh Circuit wrote that the "basic distinction" between cases such as *South Carolina v. Baker* and *New York*, "is that states and private parties may be the *objects* of regulation, although states cannot be compelled to become regulators of private conduct." 163 F.3d at 1004 (Pet.-Ap. 14a). The Seventh Circuit's decision relies on creating the distinction that the DPPA "affects states as owners of databases; it does not affect them in their role as governments." *Id.; see also id.* at 1004-05. However, there is no authority for this "distinction," and the Court of Appeals cited none. Furthermore, the Seventh Circuit reasoned that the DPPA was in fact a law of general applicability because other federal acts (such as the Video Privacy Protection Act, the Bank Secrecy Act and the Stored Wire and Electronic Communications and Transactional Records Access Act) regulate the disclosure of similar information from other databases. 163 F.3d at 1004-05 (Pet.-Ap. 14a-19a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals itself recognized that the circuits are split on the issue raised in this petition, whether the Driver's Privacy Protection Act is constitutional. 163 F.3d at 1001 (Pet.-Ap. 10a), petition for cert. pending, No. 98-1760 (filed May 3, 1999). The Seventh Circuit and the Tenth Circuit upheld the DPPA. *See State of Oklahoma ex rel. Oklahoma Dep't of Public Safety v. United States*, 161 F.3d 1266 (CA10 1998). The Fourth and Eleventh Circuits found the DPPA to be unconstitutional. *See Condon v. Reno*, 155 F.3d 453 (CA4 1998), petition for cert. pending, No. 98-1464 (filed Mar. 15, 1999); *Pryor, et al. v. Reno*, ___ F.3d ___, 1999 WL 187050 (CA11 1999).

This case is also of great national importance. The DPPA requires every State's department of motor vehicles to comply with Congress' directives on when a State department of motor vehicles *must* release information in its records, *may* release information in its records or is *prohibited* from releasing information in its records. This issue affects every State in the nation. The Seventh Circuit's resolution on the question of whether the DPPA is constitutional addressed broader federalism issues potentially applicable to numerous other laws, which makes the case one of even more national importance.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS FROM OTHER CIRCUITS.

Four circuits have explicitly addressed the question raised in this petition, whether the Driver's Privacy Protection Act violates the Tenth Amendment. Two circuits have upheld the DPPA. *See Travis v. Reno*, 163 F.3d 1000 (CA7 1998) (Pet.-Ap. 9a), and *State of Oklahoma ex rel. Oklahoma Dep't of Public Safety v. United States*, 161 F.3d

1266 (CA10 1998). Two circuits have found the DPPA to be unconstitutional. *See Condon v. Reno*, 155 F.3d 453 (CA4 1998), and *Pryor, et al. v. Reno*, __ F.3d __, 1999 WL 187050 (CA11 1999).

The Seventh Circuit Court of Appeals specifically noted that its decision was consistent with that of the Tenth Circuit, but conflicted with that of the Fourth Circuit. 163 F.3d at 1001 (Pet.-Ap. 10a). Four months after the Seventh Circuit's decision, the split in the circuits was deepened by the Eleventh Circuit's determination that the DPPA is unconstitutional. *See Pryor v. Reno.*

This issue that has split the circuits is ready for this Court's resolution.

II. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION.

This case involves a significant question of constitutional law concerning the limitations on Congress' power to require States to implement and administer a federal regulatory program. The issue raises the interest of States in protecting their sovereignty and their ability to remain responsive and accountable to their citizens. In petitioning for certiorari in *Reno v. Condon*, the respondents here have effectively supported petitioners' position that this petition raises an issue of national importance.

In enacting the DPPA Congress has effectively required State departments of motor vehicles and State officers to implement the DPPA by applying it to requests for information from State departments of motor vehicles and authorizing penalties for non-compliance. Under Congress' directive, a State employee determines whether the requested information is "personal" under the DPPA, and if so, who must, may or may not receive the requested information

under the DPPA. *See* 18 U.S.C. §§ 2721(a) and (b) and 2725(3). The DPPA undermines the State of Wisconsin's legislation on the use of records created and maintained by the State, which are public documents pursuant to Wisconsin statute. *See* Wis. Stat. §§ 19.35(1)(a), 341.17(6) and 343.24(1) and (2m). The Wisconsin Department of Transportation, like State departments of motor vehicles across the country, has had to change its practices with respect to information requests to comply with the DPPA, and has had to go against the State of Wisconsin's policies and practices of open, public governmental records. *See generally*, R. 24, Schwartz Aff., Wehrle Aff., Thiel Aff.; 12 F. Supp. 2d at 923 (Pet.-Ap. 30a).

Furthermore, the Court of Appeals' resolution of the issue of the constitutionality of the DPPA in this particular case addressed broader federalism issues potentially applicable to numerous other laws. *New York* and *Printz* ensured (laws of general applicability aside) that the federal government may not mandate that States legislate or administer federal programs. The Seventh Circuit's decision creates a gaping hole in that principle and warrants review by this Court.

In *New York*, this Court struck down the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1995, which offered States the choice of accepting ownership of waste or regulating according to Congress' instructions, on the grounds that it violated the Tenth Amendment. This Court held that the flaw in the provision was that "[a] State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress." *Id.* at 177. The Seventh Circuit misapprehended the precedent of *New York* when it upheld the DPPA despite its own admission that "[i]n order to comply with the Act the Division of Motor Vehicles must adopt new rules by regulation or legislation." 163 F.3d at 1003 (Pet.-Ap. 14a).

The issue before this Court in *Printz* was whether the Tenth Amendment was violated by interim provisions of the Brady Handgun Violence Prevention Act that required a chief law enforcement officer (CLEO) of a handgun transferee's residence to run a background check to determine whether the possession of the gun would violate the law. This Court described the Brady Act as "purport[ing] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." 117 S. Ct. at 2369. This Court noted that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 2380. This Court wrote:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . . . Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected.

Id. at 2382.

The scenario established by the DPPA is parallel to the one struck down in *Printz*. The Seventh Circuit itself admits: "Moreover, the Act compels employees of the Division of Motor Vehicles to take certain actions in response to requests

for information and pay penalties if they fail." 163 F.3d at 1003 (Pet.-Ap. 14a). State employees must determine whether requested information is "personal" under the DPPA. If it is personal information the State employees must then determine whether the DPPA prohibits disclosure of that information, mandates disclosure of that information or permits disclosure of that information, and then take the appropriate action. As with the CLEO in *Printz* who faced the blame if the wrong person was permitted to purchase a handgun, it is the Wisconsin Department of Transportation that has faced a loss of goodwill from the public it serves as a result of the new measures put into place to comply with the DPPA.

The Seventh Circuit stated that the "basic distinction" between cases such as *South Carolina v. Baker* and *New York*, "is that states and private parties may be the *objects* of regulation, although states cannot be compelled to become regulators of private conduct." 163 F.3d at 1004 (Pet.-Ap. 14a). But the Seventh Circuit failed to understand how the DPPA *is* requiring States to regulate disclosure and not merely to be passive objects of regulation. The Seventh Circuit's decision relies on creating the distinction that "[t]he Driver's Privacy Protection Act affects states as owners of databases; it does not affect them in their role as governments." *Id.; see also id.* at 1004-05. The Seventh Circuit cites no authority for this "distinction" that it views as determinative. The Seventh Circuit's view of the Wisconsin Department of Transportation as a 'market participant' that "owns" a database is also off the mark. The Wisconsin Department of Transportation is a regulator of driving in the State, and therefore creates a database of that information. The Wisconsin Department of Transportation does charge a fee for producing requested materials pursuant to State law, however, it is not engaged in the business of buying and selling databases. Certainly whether the DPPA is constitutional could not turn on whether a State charges a fee to those who request information the State collects. Moreover, there is no real distinction between what the Wisconsin Department of Transportation is doing and what

the State law enforcement officer was doing in *Printz*. The CLEO was being required to research the State and local government's record-keeping systems to determine whether the firearms transaction would be unlawful, but he was not required to take any governmental or enforcement action. *See Printz*, 117 S. Ct. at 2369. Likewise here, an employee of the Wisconsin Division of Motor Vehicles is required to research each request for information and to determine whether the disclosure is lawful or not under the DPPA.

The Seventh Circuit wrote that in *South Carolina v. Baker*, this Court "sustained a statute that was addressed exclusively to the states" and relied heavily on that case. *Travis v. Reno*, 163 F.3d at 1005 (Pet.-Ap. 19a). However, in *South Carolina v. Baker* this Court itself noted that the challenged law was one of general applicability. 485 U.S. at 526-27 (provisions apply to all publicly offered long-term bonds). In *New York* and *Printz* this Court expressly distinguished *South Carolina v. Baker* on the grounds that it and other such cases addressed laws that were (or were conceded to be) of general applicability. *See New York*, 505 U.S. at 160; *Printz*, 117 S. Ct. at 2383. The DPPA is regulating the way in which Wisconsin disseminates information collected by its Department of Transportation, it is not a law of general applicability regulating "personal information" anywhere the State or private entities may have it.

The significant question of constitutional law this case presents is ready for resolution by this Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

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May 1999

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APPENDIX FOR WRIT OF CERTIORARI

APPENDIX

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CHAPTER 123-PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR VEHICLE RECORDS

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general.—Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) Permissible uses.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions;

motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims

investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has implemented methods and procedures to ensure that—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations

will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

§ 2722. Additional unlawful acts

(a) Procurement for unlawful purpose.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties

(a) Criminal fine.—A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State department of motor vehicles.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) Cause of action.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof; and

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 11, 1999.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

DAVID M. TRAVIS, et al., Plaintiffs-Appellees,	)	Appeal from the United States District Court for the Western District of Wisconsin.
No. 98-2881 **v.**	)	
JANET RENO, Attorney General of the United States, and UNITED STATES OF AMERICA, Defendants-Appellants.	)	No. 97-C-0701-C Barbara B. Crabb, Judge.

Order

Plaintiffs-appellees filed a petition for rehearing and petition for rehearing en banc on February 1,

1999. No judge in regular active service has requested a vote on the petition for rehearing en banc; and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

In the
United States Court of Appeals
for the Seventh Circuit

No. 98-2881

DAVID M. TRAVIS, *et al.*,

Plaintiffs-Appellees,

v.

JANET RENO, Attorney General of the
United States, and UNITED STATES OF AMERICA,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 97-C-0701-C-**Barbara B. Crabb**, *Judge*.

ARGUED NOVEMBER 12, 1998-DECIDED
DECEMBER 16, 1998

Before FLAUM, EASTERBROOK, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. This case poses the question whether Congress has the power to enact the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25, which regulates disclosures of the information that states maintain in drivers' records. The district court held that the Act exceeds Congress' authority under the commerce clause (read in light of the tenth amendment) because the Act commandeers states to do the national government's bidding.

12 F. Supp. 2d 921 (W. D. Wis. 1998). After the district court released its opinion, the fourth circuit concluded that the Act is unconstitutional because it applies exclusively to states. *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998). But the tenth circuit has disagreed and held that the Act is valid. *Oklahoma v. Reno*, 161 F.3d 1266 (10th Cir. 1998), reversing 994 F. Supp. 1358 (W. D. Okla. 1997). Accord, *Pryor v. Reno*, 998 F. Supp. 1317 (M. D. Ala. 1998). Although each side to this controversy can take comfort from decisions of the Supreme Court, we conclude that, whatever may be said about the Act's wisdom, it is within the commerce power and compatible with constitutional principles of federalism. This eliminates any need to discuss whether the Act also is within the legislative power under §5 of the fourteenth amendment.

I

The Act forbids the disclosure of "personal information about any individual obtained by the [State's] department [of motor vehicles] in connection with a motor vehicle record" except to the extent that the Act itself permits or requires disclosure. 18 U.S.C. § 2721(a). Elsewhere the Act requires disclosure for law enforcement and pollution-control uses; forbids disclosure for commercial uses (such as the creation of mailing lists); and makes disclosure optional for other uses, such as research and insurance. Violations of the Act are punishable by fines up to $5,000 per day. 18 U.S.C. § 2723. Wisconsin contends, and we must assume, that in order to comply with the Act it must make costly changes in the way it handles requests for access to its motor vehicle licensing records. Moreover, because Wisconsin formerly sold its records for use in creating mailing lists, and for other purposes, the Act deprives the state of approximately $8 million in annual revenue. ("Wisconsin" is shorthand for the state's Division of Motor Vehicles and its director, who intervened as plaintiffs after questions were raised about the standing of the original plaintiffs. The Division, as the regulated entity, has an Article III

controversy with the United States, so we need not discuss the original plaintiffs' standing.)

A

Driving is an interstate activity, as is the mailing-list business. Information about Wisconsin's drivers readily can affect movement and business transactions outside that state's borders. Wisconsin does not doubt that, but for the principles of state sovereignty that underlie our Nation's federal structure (and are acknowledged by the tenth and eleventh amendments), Congress would possess power under Art. I § 8 cl. 3 of the Constitution to enact this statute. The interstate components are substantial in the aggregate even if a single disclosure has but a slight effect on commerce. See *United States v. Lopez*, 514 U.S. 549, 558-61, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed.2d 122 (1942); *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997).

Nonetheless, ever since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Supreme Court has recognized that suppositions implicit in the structure of the Constitution limit the power of the states to tax or regulate the national government. The intergovernmental tax immunity doctrine that Chief Justice Marshall articulated in *McCulloch* (and that the Court extended in *Collector v. Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed.2d 122 (1871), and *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S. Ct. 673, 39 L.Ed. 759 (1895), to federal taxation of states and their contractors) foreclosed all taxation of a governmental body or its instrumentalities on the ground that the power to tax is the power to destroy, a rationale equally applicable to the imposition of costly regulation. (It is through the power to regulate the movement of goods in interstate commerce that Congress has forbidden child labor, *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L.Ed. 609 (1941), and for a time prohibited lotteries. *Lottery Case*, 188 U.S. 321, 23 S.

Ct. 321, 47 L.Ed. 492 (1903).) Gradually intergovernmental immunity turned into a rule of nondiscrimination, under which the governmental body's protection is vicarious: one government may tax (or regulate) another's trading partners only to the extent it imposes equivalent burdens on those who do business with private citizens. See *South Carolina v. Baker*, 485 U.S. 505, 515-27, 108 S. Ct. 1355, 99 L.Ed.2d 592 (1988). Neutrality between governmental and private spheres is a principal ground on which the Supreme Court has held that states may be subjected to regulation when they participate in the economic marketplace--for example, by hiring workers covered by the Fair Labor Standards Act. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985); *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L.Ed.2d 1020 (1968). See also *South Carolina*, 485 U.S. at 511-15, 108 S. Ct. 1355 (states may be required to issue bonds in registered form); *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 102 S. Ct. 1349, 71 L.Ed.2d 547 (1982) (labor laws apply to state-owned railroads); *Fry v. United States*, 421 U.S. 542, 95 S. Ct. 1792, 44 L.Ed.2d 363 (1975) (states are bound by generally applicable wage and price controls). So long as public market participants are treated the same as private ones, they enjoy the protection the latter have been able to secure from the legislature; and as Congress is not about to destroy private industry (think what that would do to the tax base!) it can not hobble the states either. *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L.Ed.2d 245 (1976), adopted a proviso to this approach: that Congress may not disrupt the states' ability to manage core governmental functions such as police and fire protection. *Garcia* overruled *National League of Cities* after concluding that the set of traditional or essential governmental functions is too indistinct to be a constitutional norm. Even if *Garcia* should be overruled in turn, this branch of analysis would do Wisconsin no good. Nothing in the Driver's Privacy Protection Act interferes with states' ability to license drivers and remove dangerous ones from the

road; it regulates external rather than internal uses of the information.

Alongside the prohibition of discrimination against the states is a rule that remains absolute, a genuine "immunity." Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288, 101 S. Ct. 2352, 69 L.Ed.2d 1 (1981). See also *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992); *FERC v. Mississippi*, 456 U.S. 742, 762-66, 102 S. Ct. 2126, 72 L.Ed.2d 532 (1982). When Congress enacted legislation requiring states to pass laws regulating nuclear waste--and to pay the steep penalty of taking title to all waste within their borders if they failed to comply--the Court replied (in *New York*) that the national government simply may not direct the states to use their legislative powers to regulate private conduct. *Printz* adds that the same principle applies to the federal government's direction that a state's executive branch enforce federal rules. Although the Constitution's supremacy clause precludes any effort by states to divorce themselves from the application of federal law when they choose to act, see *Printz*, 117 S. Ct. at 2374; *FERC v. Mississippi*, 456 U.S. at 759-69, 102 S. Ct. 2126; *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L.Ed.2d 332 (1990); *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L.Ed.2d 967 (1947); *Claflin v. Houseman*, 93 U.S. 130, 23 L.Ed.2d 833 (1876); *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053-56 (7th Cir. 1990) (concurring opinion), vacated in part as moot, 499 U.S. 933, 111 S. Ct. 1383, 113 L.Ed.2d 441 (1991), Congress must assign the enforcement duty to federal officials unless the Constitution itself authorizes use of the states as agents (see Art. I §4 cl. 1; *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995)). When the national government conscripts the legislative or executive arms of a

state, the law violates a structural immunity and "a 'balancing' analysis is inappropriate." *Printz*, 117 S. Ct. at 2383.

B

Wisconsin seeks to persuade us that the Act has the same vice as the statutes condemned in *Printz* and *New York*. In order to comply with the Act the Division of Motor Vehicles must adopt new rules by regulation or legislation. Moreover, the Act compels employees of the Division of Motor Vehicles to take certain actions in response to requests for information and pay penalties if they fail. Wisconsin's brief observes that "the mandatory and permissible disclosure provisions of 18 U.S.C. § 2721(b) effectively command State departments of motor vehicles to establish a mechanism for determining when it [sic] has a mandatory or permissive disclosure situation". The need to establish a mechanism is the forbidden commandeering, the argument concludes. But if this is the same thing as the situation in *Printz* and *New York*, then the application of the Fair Labor Standards Act to the states likewise is unconstitutional, for the FLSA requires states to establish record-keeping systems and to establish mechanisms for paying employees according to a national formula. Every federal law that affects the way states participate in the marketplace may do the same. Yet the basic distinction between cases such as *South Carolina* and cases such as *New York* is that states and private parties may be the *objects* of regulation, although states cannot be compelled to become regulators of private conduct. The Driver's Privacy Protection Act affects states as owners of databases; it does not affect them in their role as governments.

Congress borrowed the Act's approach from the Video Privacy Protection Act, 18 U.S.C. § 2710. Wisconsin conceded at oral argument that if the state operated a video tape rental service it would be required to comply with

§ 2710. But that gives away the game. Compliance with § 2710 requires the same kind of screening as does compliance with § 2721. This must mean that the steps a state agency takes to identify mandatory, discretionary, and forbidden disclosures of information from a database in its control is not the sort of "conscription" to which *Printz* and *New York* refer. *South Carolina* makes the point in language equally applicable to the Driver's Privacy Protection Act:

> Section 310 [which requires the states to issue bonds in registered form] regulates state activities; it does not . . . seek to control or influence the manner in which States regulate private parties. The NGA [National Governors' Association] nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect. After *Garcia*, for example, several States and municipalities had to take administrative and legislative action to alter the employment practices or raise the funds necessary to comply with the wage and overtime provisions of the Federal Labor Standards Act. Indeed, even the pre-*Garcia* line of

> Tenth Amendment cases recognized that Congress could constitutionally impose federal requirements on States that States could meet only by amending their statutes. See *EEOC v. Wyoming*, 460 U.S. 226, 253-254, and n.2, 103 S. Ct. 1054, 75 L.Ed.2d 18 (1983) (Burger, C.J., dissenting) (citing state statutes from over half the States that did not comply with the federal statute upheld by the Court). Under the NGA's theory, moreover, any State could immunize its activities from federal regulation by simply codifying the manner in which it engages in those activities. In short, the NGA's theory of "commandeering" would not only render *Garcia* a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled *National League of Cities* line of cases.

485 U.S. at 514-15, 108 S. Ct. 1355 (footnote omitted). Wisconsin might respond that states did not have to issue bonds, but that states invariably license drivers and therefore cannot escape the federal rule by withdrawing from the activity (as they could stay out of the video rental business). Yet the activity under consideration is not licensing but disclosure. Wisconsin elected to reveal (often to sell) information from its drivers' database; it could substantially limit the difficulty of compliance by limiting disclosure to the lawenforcement uses that no holder of a database (state or private) can avoid. Ability to withdraw completely from an activity has never been essential to federal regulation. Issuing bonds is a way to raise money, which states must do to operate. Likewise states must hire employees, for which federal rules determine recordkeeping and compensation obligations. There is just no blinking the fact that federal law pervasively regulates states as marketplace participants; the

anti-commandeering rule comes *into play only when the* federal government calls on the states to use their sovereign powers as regulators of their citizens. Because the Driver's Privacy Protection Act affects states as owners of data, rather than as sovereigns, it does not commandeer states in violation of the Constitution. Wisconsin is no more a regulator or law enforcer when it decides what information to release from its database than is the corner Blockbuster Video outlet.

C

What persuaded the fourth circuit in *Condon* that the Act exceeds Congress' powers is a belief that the Act not only requires states to administer a federal program but also discriminates against them. The Driver's Privacy Protection Act applies *only* to states, the fourth circuit stated, and thus cannot be classified with neutral laws such as the FLSA that regulate all participants in a marketplace. A state-specific law does not provide states with the protection that private groups have arranged for themselves; it could in principle be a vehicle of destruction. Although the Driver's Privacy Protection Act applies to contractors that administer a database on a state's behalf, and to recipients of information from a state, see 18 U.S.C. § 2721(a), (c), these efforts to avoid loopholes do not ensure that public and private operators of different databases experience similar costs of compliance. For the same reason, redrafting the statute so that it would apply to "any state or private entity that operates a department of motor vehicles" (rather than to every "State department of motor vehicles", as § 2721(a) does) would be pointless; there is no equivalent private enterprise. Although the lack of private licensing bureaus makes states a legitimate class for legislation, cf. *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L.Ed.2d 867 (1977), it does not offer any protection from discriminatorily severe burdens on the databases that states operate.

Conceding this--and implicitly conceding that a law placing states at a disadvantage relative to similarly-situated private entities would be unconstitutional--the United States responds that the Act does not bear unequally on the states. Statute books teem with laws regulating the disclosure of information from databases. The Bank Secrecy Act specifies what records banks must keep, and what information they must, may, or must not disclose (see *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 94 S. Ct. 1494, 39 L.Ed.2d 812 (1974)); the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. §§ 2701-11, deals with data maintained by phone companies; other statutes regulate the disposition of data in the hands of cable TV operators (47 U.S.C. § 551), hospitals, pharmacies, universities, accountants, credit card issuers, bill collectors (15 U.S.C. § 1618b), and so on. Professionals such as physicians and lawyers encounter additional common-law limitations on the disclosure of information from their files. The national government has subjected itself to the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, the Government in the Sunshine Act, 5 U.S.C. § 552b, and the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-16, and pays penalties for improper disclosure of tax return information, 26 U.S.C. § 7431. These statutes adopt record-keeping and information-disclosure criteria at least as complex, and impose a burden at least as great, as the Driver's Privacy Protection Act. It is hard to name any substantial collection of information yet to be regulated. At oral argument counsel for both Wisconsin and the original plaintiffs disclaimed any contention that Wisconsin's burden exceeds the travail of banks or other entities regulated by statutory equivalents to the Driver's Privacy Protection Act; they do not seek an opportunity to show at trial that the state's cost per motorist surpasses the cost per bank depositor or hospital patient or federal employee. Instead the argument is formal: Congress' failure to combine all information-handling rules for the entire economy into a single statute makes the Driver's Privacy Protection Act unconstitutional.

By like reasoning, if an economy-wide statute differentiated in any way between state and private databases--something all but inevitable--no duties at all could be laid on the states.

So cast, the argument is incompatible with *South Carolina*, which sustained a statute that was addressed exclusively to the states. The law in question, § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 596, dealt with state and local governments alone. It amended 26 U.S.C. § 103, another statute limited to governmental bodies. Section 103(a) says that "[e]xcept as provided in subsection (b), gross income does not include interest on any State or local bond." Subsection (b) allows taxation of three kinds of state and local bonds, of which an unregistered bond is one. Congress used the tax system to induce states to issue registered bonds; the Supreme Court assumed that the "inducement" was no different from compulsion but nonetheless rejected a constitutional challenge to the statute. Congress had effectively required private borrowers to use registered bonds, too, but it did this in a different statute. If one statute addressed only to states passes muster when other laws place private parties under equivalent obligations, why not the Driver's Privacy Protection Act? Even in the world of the dormant commerce clause, where the Court enforces a rule that states may not discriminate against interstate commerce, the Justices do not insist that the nondiscriminatory framework be accomplished within a single statute or section; a burden on interstate commerce imposed by one law may be offset by another, if the bottom line is substantially equal burdens. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 117 S. Ct. 811, 136 L.Ed.2d 761 (1997).

To all of this the fourth circuit responded: "Congress may regulate the conduct of the States only through laws of general applicability." *Condon*, 155 F.3d at 462 (emphasis in original). The critical word is "only", and the case cited for the proposition is *New York*. The fourth circuit wrote: "the

Court specifically stated that under the *Garcia* line of cases, Congress may only 'subject[ ] a State to the same legislation applicable to private parties.'" 155 F.3d at 461 n.5, quoting from *New York*, 505 U.S. at 160, 112 S. Ct. 2408 (brackets in *Condon*). Once again, the word "only" comes from the fourth circuit rather than the Supreme Court. The full sentence in *New York* reads: "Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws." This is some distance from a holding that duties imposed on state and private parties must appear in "the same legislation". Discrimination against states is forbidden, but a nondiscriminatory system may take more than one law to implement. A statute covering all databases would rival the Internal Revenue Code for complexity without offering states any real defense from the cost and inconvenience of regulation. The Clean Air and Clean Water Acts, which could be given as examples of "generally applicable" laws affecting the states, are so riddled with exceptions, provisos, and special rules that they do not ensure equal costs for similar activities. Cf. *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 114 S. Ct. 1588, 128 L.Ed.2d 302 (1994). Anyway, Brobdignagian legislation is not the Constitution's objective, even when consolidation is feasible. Wisconsin has forsworn any desire to show that Congress has imposed on the states greater practical burdens in data handling than private parties bear and therefore has forfeited any argument that the anti-discrimination component of intergovernmental immunities scuttles the Act.

II

Plaintiffs and *amici curiae* supporting them offer additional constitutional objections to the Act. None is persuasive.

A

Both Wisconsin and the original plaintiffs insist that the Act violates the eleventh amendment, but that part of the Constitution deals with the location of private litigation, not with the substance of laws. Section 2723 permits criminal and civil fines for violations of the Act's requirements. Any action under § 2723 would be brought by the United States, and the eleventh amendment does not curtail the national government's ability to sue a state in federal court. *West Virginia v. United States*, 479 U.S. 305, 311 n.4, 107 S. Ct. 702, 93 L.Ed.2d 639 (1987). Section 2724 authorizes private litigation against "[a] person who knowingly . . . discloses or uses" information that the Act keeps confidential, but under § 2725(2) "'person' means an individual, organization or entity, but does not include a State or agency thereof". This prevents private actions against states, and one would think that it forestalls any concern under the eleventh amendment. Wisconsin fears that § 2724 will be read to authorize actions against public employees in their official capacities, leading to monetary awards that must be paid from the public fisc, but the statute seems to limit suits to personal-capacity actions, which avoids constitutional problems. *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L.Ed.2d 301 (1991). If in the future a suit under § 2724 exposes the state to financial liability, there will be time enough to determine whether the Constitution authorizes that step--which will present a question we have ducked: whether § 5 of the fourteenth amendment supports the Act and therefore authorizes Congress to override the eleventh amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997); *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998).

B

The original plaintiffs--five members of Wisconsin's legislature, one newspaper editor, and one attorney--contend

that the Act violates the first amendment (applied to the states by the fourteenth) by limiting their access to information in public records. One response is that the first amendment differs from the Freedom of Information Act. Peering into public records is not part of the "freedom of speech" that the first amendment protects. "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S. Ct. 2588, 57 L.Ed.2d 553 (1978) (plurality opinion). No one thinks that the Privacy Act violates the first amendment. Well, maybe these plaintiffs *do* think this, but the position is untenable.

Although the Supreme Court's holdings that some access rights connected to the judicial process are protected by the first amendment, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980), means that we cannot exclude the possibility that some particular record in a drivers-license system may in the future be deemed constitutionally exempt from the Act, this facial attack is not the time or place to explore that subject. We do not have a demand for a particular record that would put the constitutional issue in context. We do not have the right defendant, either. Persons who want to assert a constitutional right of access to a particular record should request that record and, if access is denied, sue the record's custodian who could have disclosed it. The United States and its Attorney General, the two defendants in this suit, do not maintain systems of drivers' records and can neither grant nor deny access to any particular information. As we have stressed in recent cases, the proper defendant is the person whose actions cause injury, not the author of the legal rule that leads to those actions. *Illinois v. Chicago*, 137 F.3d 474, 478 (7th Cir. 1998); *Quinones v. Evanston*, 58 F.3d 275, 277 (7th Cir. 1995); *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), vacated on unrelated grounds under the name *Wisconsin v. Mueller*, ___ U.S. ___, 117 S. Ct. 1077, 137 L.Ed.2d 212 (1997).

C

The original plaintiffs and an *amicus curiae* contend that the Act violates Art. 4 § 4 of the Constitution: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Even if we were to put to one side the Supreme Court's holding that claims under the guarantee clause are not justiciable when raised by private persons, see *Luther v. Borden*, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849), and perhaps even when raised by states, see *New York*, 505 U.S. at 185, 112 S. Ct. 2408, we would see little merit to the contention. How does compliance with the Act deprive states of "a Republican Form of Government"? Surely plaintiffs don't mean that all federal laws violate the Constitution when applied to states, because they may contradict the choices made by the states' elected legislators. No sensible person believes that the supremacy clause, which explicitly binds states to federal law, contradicts the guarantee clause and thereby puts the Constitution at war with itself. No sensible person thinks that when states raise money by issuing securities in interstate commerce, they are free to commit fraud because § 17 of the Securities Act of 1933, 15 U.S.C. § 77q, the anti-fraud rule, violates the guarantee clause! Or that states are constitutionally entitled to fill their treasuries by stealing from federally-insured banks. But if some federal laws can apply to states and others cannot, how are judges to choose? It is quite enough to say that the Driver's Privacy Protection Act leaves the state's internal and political affairs alone and regulates only how it interacts with private parties who seek information in its possession.

III

Many thoughtful people believe that *National League of Cities* is more faithful to the original constitutional plan than is *Garcia*. But our part is to apply the Supreme Court's jurisprudence as we find it. Indeed, for reasons we have discussed, Wisconsin's position would be doubtful even if *National League of Cities* were resurrected. The Driver's Privacy Protection Act affects the states as operators of databases, not as sovereigns, and does not interfere with the achievement of any essential state function or discriminate against the states. Accordingly, the judgment of the district court is

REVERSED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE REPRESENTATIVE DAVID M. TRAVIS, STATE SENATOR FRED RISSER, STATE REPRESENTATIVE ROBERT K. ZUKOWSKI, STATE REPRESENTATIVE EUGENE HAHN, STATE REPRESENTATIVE MICHAEL D. HUEBSCH, DAVID ZWEIFEL and PAMELA MOORSHEAD,

Plaintiff(s),

JUDGMENT IN A CIVIL CASE

and

Case No. 97-C-0701-C

ROGER D. CROSS, in his official capacity as Administrator of the Division of Motor Vehicles of the Wisconsin Department of Transportation, and the DIVISION OF MOTOR VEHICLES OF THE WISCONSIN DEPARTMENT OF TRANSPORTATION,

Realigned Plaintiffs,

v.

JANET RENO, Attorney General of the United States, and the UNITED STATES OF AMERICA,

Defendant(s).

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the motion for summary judgment of plaintiffs Roger Cross and the Division of Motor Vehicles of the Wisconsin Department of Transportation is GRANTED.

IT IS ORDERED AND ADJUDGED that the Driver's Privacy Protection Act violates the Tenth Amendment of the United States Constitution. IT IS FURTHER ORDERED AND ADJUDGED that defendants are enjoined permanently from enforcing the Driver's Privacy Protection Act against plaintiffs, and this case is CLOSED.

Approved as to form this 10th day of June, 1998.

/s/
BARBARA B. CRABB
U.S. DISTRICT JUDGE

/s/ June 11, 1998
Joseph W. Skupniewitz, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE REPRESENTATIVE DAVID M. TRAVIS, STATE SENATOR FRED RISSER, STATE REPRESENTATIVE ROBERT K. ZUKOWSKI, STATE REPRESENTATIVE EUGENE HAHN, STATE REPRESENTATIVE MICHAEL D. HUEBSCH, DAVID ZWEIFEL and PAMELA MOORSHEAD,

OPINION AND ORDER

Plaintiffs,

97-C-701-C

and

ROGER D. CROSS, in his official capacity as Administrator of the Division of Motor Vehicles of the Wisconsin Department of Transportation, and the DIVISION OF MOTOR VEHICLES OF THE WISCONSIN DEPARTMENT OF TRANSPORTATION,

Realigned Plaintiffs,

v.

JANET RENO, Attorney General of the United States, and the UNITED STATES OF AMERICA,

Defendants.

In this civil action for declaratory and injunctive relief, plaintiffs challenge the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, which prohibits states from disclosing "personal information" collected by their

motor vehicle departments in connection with automobile and driver's license registration except for certain permissible uses. Plaintiffs contend that the act violates the First, Tenth and Eleventh Amendments as well as the Guarantee Clause of Article IV of the Constitution and they seek an order enjoining enforcement of the act. Defendants contend that even if the act runs afoul of the Tenth Amendment, Congress has authority to pass it under the Fourteenth Amendment because it is an attempt to enforce the right of privacy in the nondisclosure of confidential information.

The case is before the court on the motion of defendants Janet Reno and United States of America to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief may be granted. In addition, both sets of plaintiffs have filed motions for summary judgment. I conclude that the act forces state officials and state employees to administer and enforce a federal regulatory scheme in violation of the Tenth Amendment. Furthermore, the act is not a valid exercise of Congress's authority under § 5 of the Fourteenth Amendment because the right of privacy does not encompass the type of information covered by the act.

Defendants raise compelling doubts about the standing of the original plaintiffs, Travis, Risser, Zukowski, Hahn, Huebsch, Zweifel and Moorshead, to bring their claims. However, there is no need to reach the merits of these arguments. It is undisputed that the state plaintiffs, Cross and Division of Motor Vehicles, are proper parties to this action; both sets of plaintiffs raise Tenth Amendment challenges; and resolution of this issue in favor of the state plaintiffs is dispositive of the entire case. For the same reasons, there is no need to address plaintiffs' arguments regarding the First and Eleventh Amendments or the Guarantee Clause. The state plaintiffs' motion for summary judgment will be granted, defendants' motion to dismiss will

be denied with prejudice and the original plaintiffs' motion for summary judgment will be denied without prejudice.

As an initial matter, I note that even though the State of Wisconsin is not a stranger to this court, the state plaintiffs have disregarded this court's standing procedures to be followed on motions for summary judgment by citing numerous factual propositions not contained in their proposed findings of fact. These proposed facts will be disregarded. For the sole purpose of deciding this motion, I find from the parties' proposed findings of fact and from the record that there is no genuine dispute with respect to the following material facts.

UNDISPUTED FACTS

Defendant United States of America is a sovereign constitutional government of those limited enumerated powers specified in and restrained by the United States Constitution. Defendant Janet Reno is Attorney General of defendant United States and is responsible for the enforcement of the criminal and civil penalties that may be imposed pursuant to the Driver's Privacy Protection Act.

Plaintiffs David Travis, Robert Zukowski, Eugene Hahn and Michael D. Huebsch are duly elected members of the Wisconsin Assembly. Plaintiff Fred Risser is a duly elected member of the Wisconsin Senate. Along with other legislators, plaintiffs Travis, Zukowski, Huebsch and Risser are responsible for making decisions about issues facing state government. Plaintiff David Zweifel is the editor of the Capitol Times, a Madison newspaper, and president of the Wisconsin Freedom of Information Council, an organization composed of representatives of state media outlets dedicated to preserving maximum public access to government records. Plaintiff Pamela Moorshead is an attorney licensed to practice law in the state of Wisconsin. Much of her practice

concentrates on the defense of individuals charged with criminal and traffic violations.

Plaintiff Roger Cross is Administrator of plaintiff Division of Motor Vehicles of the Wisconsin Department of Transportation. Plaintiffs Cross, Division of Motor Vehicles and their officers and employees are responsible for implementing the Driver's Privacy Protection Act. They have had to develop a form to ascertain whether individuals requesting driver record information are entitled to personal information under the act. In addition, the state plaintiffs have had to train employees and monitor their compliance with the act, mail a form to bulk mail account holders, review completed forms, answer questions about the act and send forms to individuals upon request. Congress has provided no federal funds to states for such activities. The state plaintiffs have received numerous complaints about restrictions imposed by the act. Plaintiff Division of Motor Vehicles receives approximately $8 million each year in revenue from sales of driving record abstracts to paying customers at a rate of $3 - 4 per record. It is possible that implementation of the act will have adverse effects on this revenue stream.

Recently, the original plaintiffs, through counsel, requested the driver record information of Louis Kent Ostrom of Madison. The Wisconsin State Journal had reported that Ostrom had been arrested for drunk driving and destruction of property while on his way to court for an appearance on an earlier charge of drunk driving. Plaintiffs requested this information to determine whether Ostrom was subject to a court-ordered interlock device and, if so, whether he had complied with that order. Counsel for plaintiffs Cross and the Division of Motor Vehicles refused to grant this request because of the act.

OPINION

A. *Motor Vehicle and Driver Record Information under Federal and Wisconsin Law*

The Driver's Privacy Protection Act prohibits state motor vehicle departments from disclosing personal information obtained in connection with a motor vehicle record. 18 U.S.C. § 2721. The act defines "personal information" as anything "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." § 2725(3). There are numerous exceptions to the general rule against disclosure. States must disclose information in connection with various matters related to vehicle and driver safety and to carry out certain federal statutes related to driving and automobiles. § 2721(b). In addition, Congress has provided fourteen "permissible uses" for which information may be disclosed. § 2721(b)(1)-(14). For example, state motor vehicle departments may release personal information for use by a governmental agency, insurer, tow truck operator, or licensed private investigator. Also, information may be released in connection with judicial or arbitral proceedings, for bulk distribution and to anyone who has written permission of the individual to whom the information pertains. Finally, motor vehicle departments may allow individuals to opt out of these restrictions, thereby permitting free disclosure of any information provided to the departments by such individuals. § 2721(b)(11). Authorized recipients of personal information are prohibited from reselling or redisclosing information except as provided in the act. § 2721(c).

State motor vehicle departments, including plaintiff Division of Motor Vehicles, face civil penalties of $5,000 a day for each day they maintain a policy or practice of

substantial noncompliance with the act. § 2723(b). Persons who violate the act knowingly, including plaintiff Cross and the officers and employees of plaintiff Division of Motor Vehicles, face criminal fines. § 2723(a). In addition, persons may be subject to individual civil actions for actual and punitive damages and other sanctions for knowingly disclosing, obtaining or using any personal information in violation of the act. § 2724. The act defines "person" as "an individual, organization or entity, but does not include a State or agency thereof." § 2725(2).

Under Wisconsin law, driver license and motor vehicle registration information is a public record. Wis. Stat. §§ 19.35(1)(a), 341.17(6), 343.24(1) and (2m). Custodians of driver record information are prohibited from requiring persons requesting such information to disclose their names or the purposes of their request. § 19.35(1)(i).

B. *Fourteenth Amendment*

The Supreme Court has indicated that when Congress passes a law pursuant to § 5 of the Fourteenth Amendment the limitations on congressional authority imposed by the Tenth Amendment are "attenuated" because the post-Civil War amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 468, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (citation and quotation marks omitted). Defendants observe that the Court has located the right to privacy in the Fourteenth Amendment, *see Whalen v. Roe*, 429 U.S. 589, 598 n. 23, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), and argue that Congress passed the Driver's Privacy Protection Act pursuant to § 5 of this amendment to safeguard the privacy of personal information collected by state motor vehicle departments. Thus, according to defendants, even if the act runs afoul of the Tenth Amendment, it is constitutional under the Fourteenth Amendment.

In *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 795-796 (7th Cir.1987) (citing *Whalen*, 429 U.S. at 598-600, 97 S.Ct. 869), the Seventh Circuit concluded that the right of privacy encompasses an interest in the confidentiality of private information, holding that an individual cannot be compelled to divulge such information under certain circumstances. The court acknowledged that the Fifth Circuit had held that the right of privacy might prohibit the government from disclosing private information, but it noted that the circumstances in that case, *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir.1981), were not those of plaintiff Pesce. (Fadjo alleged that the state breached his federal right of confidentiality when it released private information to insurance investigators; Pesce was disciplined for failing to disclose to school officials the sexual abuse of a student he learned about in a confidential counseling session.) *See Pesce*, 830 F.2d at 797 (citing *Fadjo*, 633 F.2d at 1175-1176). Although other courts of appeal have joined the Fifth Circuit in concluding that there is a right to privacy in the nondisclosure of private information, some circuits are skeptical of this notion. *See American Federation of Government Employees v. Department of Housing and Urban Development*, 118 F.3d 786, 791-793 (D.C.Cir.1997) (collecting cases and "expressing grave doubts as to the existence" of such a right).

Even assuming that there is a constitutional right to privacy in the nondisclosure of private information, defendants breeze by the operative question whether information protected by the act is "private." It is not. Because the right of privacy is not absolute, *see Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir.1990), the Constitution does not prohibit disclosure of all information about an individual. There must be a legitimate expectation of privacy in the confidentiality of information to justify constitutional protection. *See id.* "The legitimacy of an individual's expectations depends, at least in part, upon the intimate or otherwise personal nature of the material which

the state possesses." *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir.1986). Under this standard, courts have held that there is a legitimate expectation of privacy regarding medical records, *see United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir.1980), the contents of a personal diary, *see Sheets v. Salt Lake County*, 45 F.3d 1383, 1387-1388 (10th Cir.1995), and financial records. *See Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 115 (3d Cir.1987). However, privacy interests are not implicated by an internal investigation report conducted by a city fire department indicating that certain firefighters had used illegal drugs, *see Mangels*, 789 F.2d at 839, or information regarding an individual's marital and family criminal history that is "freely available in public records." *Walls*, 895 F.2d at 193.

The act prohibits disclosure of "an individual's photograph, social security number, driver identification number, name, address ..., telephone number, and medical or disability information...." 18 U.S.C. § 2725(3). There is no constitutional right to privacy in the disclosure of this information because there is no legitimate expectation of confidentiality regarding it. One's name, address and telephone number are available to anyone with a phone book. Although the other information subject to the act is arguably more personal in nature, it is hardly more sensitive than one's marital, drug abuse and family criminal history. Driver identification and social security numbers are disclosed regularly, usually when cashing a check, applying for credit or in any situation in which an individual must produce a driver's license. Defendants concede this point, but counter that individuals "only expect to produce their driver's licenses ... selectively and voluntarily." Defs.' Br. in Opp. to Mot. for Summ. J. (Dkt.# 26) at 13. Though defendants may be correct, the level of confidentiality between individuals and their doctors and accountants and the sensitivity of information entrusted to these professionals is not on par with the type of transactions engaged in with supermarket

cashiers and others who are frequently on the receiving end of information subject to the act. In any event, plaintiffs note correctly that it is doubtful whether the act will safeguard anyone's privacy. The act is riddled with exceptions that any determined, resourceful person could exploit, particularly since there are no standards for verifying the truth or accuracy of claims made by individuals requesting information.

C. *Tenth Amendment*

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Plaintiffs contend that the Driver's Privacy Protection Act violates the Tenth Amendment because it "commandeers" Wisconsin within the meaning of two recent Supreme Court opinions, *Printz v. United States*, 521 U.S. 98, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) and *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). To date, three district courts have analyzed whether the act runs afoul of the Tenth Amendment. *See Pryor v. Reno*, 998 F. Supp. 1317 (M.D.Ala.1998) (held constitutional); *Condon v. Reno*, 972 F. Supp. 977 (D.S.C.1997) (held unconstitutional); *State of Oklahoma ex rel. Oklahoma Dept. of Public Safety v. United States*, 994 F. Supp. 1358 (W.D.Okla.1997) (same).

Although Tenth Amendment jurisprudence has been a moving target over the past two decades, *see, e.g., National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (overruling *National League of Cities*), the Court has recognized consistently that the amendment is one of many ways in which the Constitution preserves a structural balance between a federal government of limited

powers and fifty autonomous states. Just as the Bill of Rights prohibits the federal government from encroaching upon certain individual liberties and just as the Commerce Clause confines federal lawmaking authority to matters related to interstate commerce, the Tenth Amendment "restrains the power of Congress." *New York*, 505 U.S. at 156, 112 S.Ct. 2408. Such restraints do not exist for the sake of restraint itself. Rather, they are an acknowledgment that "the Constitution established a system of dual sovereignty ... in which States surrendered many of their powers to the new Federal Government ... [but] retained a residual and inviolable sovereignty." *Printz*, ___ U.S. at ___, 117 S.Ct. at 2376 (citations and quotation marks omitted). In this sense, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the states." *New York*, 505 U.S. at 157, 112 S.Ct. 2408. Such limits are "not derived from the text of the Tenth Amendment itself," but from other constitutional provisions. *Id.* In essence, the Court has reasoned that the Tenth Amendment not only reserves certain powers to the states but sets some structural limits on the way in which Congress may exercise its limited powers.

Under this formulation, although Congress may not "directly compel[ ] [states] to enact or enforce a federal regulatory program," *Hodel v. Virginia Surface Mining Reclamation Ass'n, Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), Congress has at its disposal several acceptable methods of "encouraging a State to regulate in a particular way" and "influencing a State's policy choices." *New York*, 505 U.S. at 166, 112 S.Ct. 2408. For example, Congress may use its spending power to "attach conditions on the receipt of federal funds" so long as a nexus exists between these conditions and the purpose of the federal spending. *See id.* at 167, 112 S.Ct. 2408. In addition, Congress may give states the option of regulating private Commerce Clause activity according to federal standards or "having state law pre-empted by federal regulation." *Id.* at

167-168, 112 S.Ct. 2408 (citing various environmental laws as examples of this so-called "cooperative federalism").

In *New York*, 505 U.S. at 175, 112 S.Ct. 2408, the Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j. The offending provision presented states with a choice: either they could take title to radioactive waste generated within their borders or regulate storage and disposal of such waste according to the direction of Congress. The Court held that this provision went too far:

> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the states a choice between the two.
>
> * * * * * *
>
> Respondents emphasize the latitude given to the States to implement Congress' plan. The Act enables the States to regulate pursuant to Congress' instructions in any number of different ways.... This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

Id. at 176-177, 112 S.Ct. 2408. In summary, the Court declared that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.* at 188, 112 S.Ct. 2408. In *Printz*, ___ U.S. at ___, 117 S.Ct. at 2384, the Court took this notion one step further, holding that the strictures of the Tenth Amendment are not limited solely to federal authority over state legislatures:

"The Federal Government may ... [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." Unlike the "take title" provision in *New York*, the statute at issue in *Printz* did not compel state lawmakers to adopt federal regulations or legislation. However, it required "state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." *Printz*, ___ U.S. at ___, 117 S.Ct. at 2369. The Court held that no constitutionally significant distinction could be drawn between compelling a state legislature to make federal law and compelling state officials to enforce federal law. *Id.* 117 S.Ct. at 2380.

Printz involved a challenge to select provisions of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922, that required local law enforcement officers to perform three duties related to the sale of firearms: 1) conduct a background check on individuals interested in purchasing a gun; 2) provide would-be purchasers who are determined to be ineligible to own a firearm with a written statement of the reason for this determination; and 3) destroy all records related to the background checks of individuals determined to be eligible to own a firearm. *See Printz*, ___ U.S. at ___, 117 S.Ct. at 2369. The second obligation applied only if an officer chose to notify a gun dealer that a pending sale would be illegal. *Id.* The Court noted that although the act did not require such notification and although officers

> are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5-day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would illegal.

Id. As already indicated, the Court held that a federal law that directs state officials to administer or enforce a federal regulatory scheme violates the Tenth Amendment. Of course, this begs the question of identifying such laws. Unfortunately, the Court provided little explicit guidance apart from describing the Brady Act and stating that from this description it was "apparent" that the act directed state law enforcement officers to administer a federal regulatory scheme. *Id.* Nevertheless, the Court provides some illumination in its discussion of why laws such as the Brady Act and the "take title" provision violate the Tenth Amendment.

In *New York* and *Printz*, the Court did not come to the defense of state sovereignty for the purpose of preserving or increasing state power. Instead, the Court recognized that when federal regulations bear the imprimatur of a state because they are enacted by state lawmakers at the direction of Congress, a fundamental attribute of sovereignty is threatened: democratic accountability. *See New York*, 505 U.S. at 168-169 and 180-183, 112 S.Ct. 2408 (discussing ways in which state and federal officials could shift responsibility for siting waste incinerator in absence of Tenth Amendment limitations). Applying this concept to the Brady Act, the Court stated:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.... Under the present law, for example, it will be the CLEO [law enforcement officer] and not some federal official who stands between the gun purchaser and immediate

> possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes purchasers to be mistakenly rejected.

Printz, 521 U.S. at ___, 117 S.Ct. at 2382.

The Driver's Privacy Protection Act forces state officials to administer and enforce a federally enacted regulatory program in violation of the Tenth Amendment. The act establishes a detailed set of rules to control the circumstances under which Wisconsin may disclose certain information in its driver's license and motor vehicle records to third parties; these rules displace conflicting policies regarding disclosure established by Wisconsin legislators through the state's open records law; state officials are responsible for insuring that this information is disclosed only for designated purposes specified by the federal rules; and the federal government has no role in this process, financially or otherwise. If this does not describe a federal law that directs state officials to administer or enforce a federal regulatory program, the standard articulated by the Supreme Court in *New York* and *Printz* has done great damage to the English language. That the act presses state officials into federal service is confirmed further by consideration of the way in which it will diminish accountability. To paraphrase the Court in *Printz*, 117 S.Ct. at 2382, the Driver's Privacy Protection Act will put state officials in the position of taking the blame for the act's burdensomeness and defects because it will be some state official who stands between an individual interested in obtaining information subject to the act and possession of this information and it will be a state official who is blamed for any error that causes an applicant to be rejected mistakenly. That states may avoid obligations imposed by the act by "choosing" to close their motor vehicles records to the public entirely does not avoid this problem because

states, not the federal government, will remain accountable to their citizens for such a decision. Thus, although defendants insist that the act implicates nothing more remarkable than Congress's authority under the preemption clause, *New York* and *Printz* establish that when the federal government preempts and such preemption entails the administration or enforcement of federal regulations, the federal government must take political responsibility and pay the costs of regulation--something that Congress has declined to do in this instance.

Defendants assert that states are not required to administer or enforce the rules and exceptions provided in the Driver's Privacy Protection Act but do not explain how these provisions are administered and enforced in the first place. Instead, defendants suggest two ways in which the act can be distinguished from a law that presses state officials into federal service. Defendants draw a distinction between: 1) positive and negative injunctions, maintaining that while the Brady Act required local law enforcement officers to take certain actions (conduct background checks), the Driver's Privacy Protection Act prohibits state officials from taking certain actions (releasing personal information to the wrong people for the wrong purposes); and 2) Congressional enactments that require states to regulate third parties and those that apply to the states directly and are an effort to resolve state-created problems.

There is no explicit support in *New York* or *Printz* for anchoring Tenth Amendment jurisprudence in these distinctions. Rather, they are based loosely on a series of opinions involving so-called laws of general applicability that have survived Tenth Amendment scrutiny. *See Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (Fair Labor Standards Act); *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (same); *Garcia*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (same); *Fry v. United States*, 421 U.S. 542, 95

S.Ct. 1792, 44 L.Ed.2d 363 (1975) (Economic Stabilization Act); *United Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) (Railway Labor Act); *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (Age Discrimination in Employment Act); *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988). In *Printz*, ___ U.S. at ___, 117 S.Ct. at 2383 and *New York*, 505 U.S. at 160, 112 S.Ct. 2408, the Court acknowledged that it has drawn a consistent distinction between laws of general applicability and laws targeted exclusively at states. However, the Court disowned any similarity between laws of general applicability and the Brady Act and the "take title" provision. Defendants are correct that the purpose of drawing a distinction between laws of general applicability and laws directed exclusively at states is not to suggest that the former are always constitutional and the latter are always unconstitutional or to create two different standards for evaluating Tenth Amendment claims. Rather, the distinction is one indication how much a congressional enactment upsets the structural balance between federal and state sovereignty, if at all.

By way of example, *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592, involved a federal law that effectively required states to issue registered bonds and stop issuing bearer bonds. The law applied with equal force to bonds issued by the federal government and private corporations. Responding to South Carolina's contention that the law required it to amend existing state statutes and figure out how to implement a system for issuing registered bonds, the Court stated that

> [s]uch "commandeering" is an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal

> standards regulating that activity is a commonplace that presents no constitutional defects.

Id. at 514-515, 108 S.Ct. 1355. This law and the type of laws upheld in *National League of Cities* and *Fry* involved "the incidental application to the States of a federal law of general applicability." *Printz*, ___ U.S. at ___, 117 S.Ct. at 2383. By contrast, "it is the whole object of the [Brady Act] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty...." *Id.*; *see also New York*, 505 U.S. at 160, 112 S.Ct. 2408 (radioactive waste statute not example of legislation that applies equally to state and private parties alike). In *Printz*, the Court acknowledged that it has responded with greater deference to laws of general applicability and that a more forgiving analysis of the Brady Act might have been warranted had the act fit such a characterization. However, because laws such as the ones at issue in *Printz* and *New York* offend "the very principle of separate state sovereignty," any attempt to balance the relevant state and federal interests at stake is inappropriate. *Id.* When states must conform their policies regarding areas such as employment and bonds to the same federal regulations applicable to any other private employer or bond issuer, the threat to sovereignty is reduced, presumably because there is less cause for concern when Congress tells everyone what to do, as opposed to just the states. *See Garcia*, 469 U.S. at 554, 105 S.Ct. 1005 (San Antonio "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet"). As explained by the Court in *Baker*, 485 U.S. at 514, 108 S.Ct. 1355, laws of general applicability may regulate state activities, but they do not "seek to control or influence the manner in which States regulate private parties."

To state the obvious, the Driver's Privacy Protection Act is not a law of general applicability. Only states collect

driver's license and motor vehicle information and, if they so choose, disseminate it. By contrast, the taxation law in *Baker* applied generally to any state, federal or private entity that issued bonds; the employment laws in *Garcia*, *Fry*, *and Equal Employment Opportunity Commission v. Wyoming* applied generally to any state, federal or private employer. To be sure, the Driver's Privacy Protection Act restricts the way in which private parties who obtain personal information from a motor vehicle department may resell or redisclose such information and provides civil and criminal liability for those who violate these restrictions. *See* 18 U.S.C. §§ 2721(c) and 2722-2725. These provisions establish that it is not the entire object of the act to direct the functioning of state motor vehicle departments. However, the act's applicability to private parties is incidental to its foremost purpose: regulating the way in which states disseminate information collected by their motor vehicle departments. Contrary to defendants' assertion, the act does not attempt to regulate the market for information generally but only a small, state-controlled facet of this market. The Driver's Privacy Protection Act does not resemble this "general applicability" line of cases in any other significant way.

In support of the position that act's injunctions are positive as opposed to negative and that the act directly regulates state-created problems, defendants cite the following passage from *Pryor*, 998 F.Supp. at 1331:

> The DPPA does not violate the Tenth Amendment, as it is a direct prohibition on the State from releasing personal DMV records for impermissible purposes, rather than a regulation requiring the State to enforce the federal government's ban on personal DMV disclosures.

Also, in *Pryor*, the district court concluded that the act differs from the provisions at issue in *Printz* because "the DPPA neither asks State officials to arrest or report violators of the

DPPA, nor does it require States to ensure that state citizens do not use or otherwise re-disclose personal DMV information." *Id.* at 1329. With respect, I disagree with these conclusions. Although the obligations imposed upon state employees by the Driver's Privacy Protection Act may not be as onerous as those created by the Brady Act, the act is not self-enforcing or self-administering: someone must do something to insure that the state is in compliance with the act. Specifically, states must disclose personal information to carry out various federal statutes, *see* 18 U.S.C. § 2721(b), and state employees are required to review requests for information to determine whether such requests are for permissible uses. The act contains no explicit instructions regarding the extent to which state employees must investigate and confirm the accuracy of claims made by individuals requesting information. However, this does not mean that the states' obligation is not "affirmative," particularly when state employees face personal liability for violating the act knowingly. Furthermore, contrary to the court's reading in *Pryor* of the Brady Act, nothing in the act required local law enforcement officers to arrest or report violators or stop unauthorized transactions. See *Printz*, ___ U.S. at ___, 117 S.Ct. at 2369 ("The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but he is not required to do so"). Stripped of this distinction, the Driver's Privacy Protection Act and the Brady Act each require states to regulate the conduct of third parties to the extent that states are forced to control who may obtain access to certain things, whether information or handguns, without the direct participation or financial backing of the federal government. Finally, the Supreme Court has never endorsed the notion that the constitutionality of a federal law challenged under the Tenth Amendment turns on whether the law is an attempt by Congress to resolve problems attributable to states, as opposed to private parties or the federal government. Regardless who is responsible for the expanding market in

consumer information and the proliferation of handguns and radioactive waste, Congress must exercise its authority within the structural limits delineated by the Constitution and the Supreme Court should it choose to enlist the states in addressing these problems.

ORDER

IT IS ORDERED that:

1. The motion of defendants Janet Reno and United States of America to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief may be granted is DENIED;

2. The motion for summary judgment of plaintiffs David Travis, Fred Risser, Robert Zukowski, Eugene Hahn, Michael Huebsch, David Zweifel and Pamela Moorshead is DENIED without prejudice;

3. The motion for summary judgment of plaintiffs Roger Cross and the Division of Motor Vehicles of the Wisconsin Department of Transportation is GRANTED;

4. The Driver's Privacy Protection Act violates the Tenth Amendment of the United States Constitution.

5. Defendants are enjoined permanently from enforcing the Driver's Privacy Protection Act against plaintiffs.

Entered this 9th day of June, 1998.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge